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No. 88-1038

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

DIKRAN BERBERIAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

Petitioner, Dikran Berberian, replies to the facts and arguments in the Government's Brief in Opposition (BIO).

STATEMENT OF THE CASE

The Government contends that at the Armenian church "petitioner met with co-defendant Steven Dadaian and was present when Dadaian placed the bomb components into a suitcase along with explosives."[1] The evidence

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[1] BIO 4. At other places in the Brief in Opposition (BIO), this critical misstatement appears. See BIO 5 (presence at church when components of explosives were placed in the suitcase), BIO 2 (delivered components of device to other defendants at the church).

of record placed the petitioner outside the church with the co-defendant Yacoubian (2 RT 247). Dadaian who transported the explosive device and materials to Boston testified as a Government witness with immunity and denied anyone was with him when he packed the explosive device in the suitcase. (2 RT 243, 251). Dadaian also testified that petitioner was not present when his co-conspirators met to discuss their plans (2 RT 250) and that petitioner did not give him the device or tell him where it was located (2 RT 250-251).

The Government stated that Hovsepian, a conspirator, and the petitioner "in two conversations spoke in code." (BIO 2). Of the 27 FISA wiretaps, only four are short telephone conversations[2] concerning places to meet between Hovsepian and the petitioner. See Pet.

[2] There was only three conversations, because Hovsepian left a message on petitioner's answering machine about the meeting place being "number two." (Pet. 5; 2 RT 141).

5. The first call (30 Sep 82), the longest, concerned directions to a restaurant. (2 RT 123-127). In the second call (6 Oct 82) petitioner agrees to go to Hovsepian's house. (2 RT 134-135). In the third call and final conversation they agree to meet at place "number one," and Hovsepian says he has "good news." (2 RT 138-140). The characterization of the conversations as in code is misleading. That the meeting places were numbered does not justify labelling the conversations as coded. There were no coded references to explosives or to Hratch's son in the conversations of the petitioner, although they were found in the conversations between the co-defendants. These brief telephone conversations were the only direct state of mind evidence so critical in determining the existence of petitioner's nexus to the conspiracy. All language is a code of ideas, and these conversations translated from Armenian are not proof of involvement in the

conspiracy.

ARGUMENT

I. THE NINTH CIRCUIT'S CONTINUED USE OF THE SLIGHT EVIDENCE RULE IN REVIEWING CRIMINAL CONSPIRACIES CONFLICTS WITH THE CONSTITUTIONAL REQUIREMENT THAT THE RECORD REASONABLY SUPPORT A FINDING OF GUILT BEYOND A REASONABLE DOUBT (JACKSON V. VIRGINIA, 443 U.S. 307 (1979)) AND CONFLICTS WITH THE FIFTH AND ELEVENTH CIRCUITS.

The Government asserts that the Court of Appeals did not mean what it said:

> "evidence of only a **slight connection** is necessary in order to convict any one defendant of knowing participation in it." 851 F.2d 236, 238 (Emphasis added).

The Government interpolates the requirement of proof beyond a reasonable doubt (BIO 5-6) as an inherent modifier of "slight connection." This reduces the words to a tautological mantra: the clear and obvious meaning by arcane and esoteric interpretation is transformed into its antonym. The law should not resort to verbal deceptions. The defendant's knowing nexus to a conspiracy must be established by

proof beyond a reasonable doubt not by "evidence of a slight connection."[3] This appellate review formulation places too much emphasis on the existence of the conspiracy without the critical analysis, as in petitioner's case, of the proof of the defendant's knowing involvement in the conspiracy.

The "slight evidence" test is all the more dangerous because of the nature of the offense, for conspiracy is a vague and amorphous crime that depends more upon mental state than

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[3] The "slight evidence" test confuses the requirement of proof with extent of participation. The extent of participation is not relevant to the quantum determination of proof. Rather than distort the requirement of proof beyond a reasonable doubt, reviewing courts could adopt a standard federal jury instruction to address participation rather than proof:

"The extent of a defendant's participation has no bearing on the issue of the defendant's guilt. A conspirator's liability is not measured by the extent or duration of his participation. Indeed, each member may perform separate and distinct acts and may perform them at different times. Some conspirators play major roles, while others play minor parts in the scheme. An equal role is not what the law requires. In fact, even a single act may be sufficient to draw the defendant within the ambit of the conspiracy." Sand, Siffert, Loughlin, and Reiss, **Modern Federal Jury Instructions** 19-26 (rev. 1988).

act. Justice Jackson, America's prosecutor at the Nuremburg Trials, confirmed:

> The modern crime of conspiracy is so vague that it almost defies definition. Despite certain elementary and essential elements, it also, chameleon-like, takes on a special coloration from each of the many independent offenses on which it may be overlaid. It is always "predominantly mental in composition" because it consists primarily of a meeting of minds and an intent."

Krulewitch v. United States, 336 U.S. 440, 446-448 (1949). Given the broad definition of the offense and the recently relaxed rules on admissibility of co-conspirators' statements, this Court should insist on the enforcement of proof beyond a reasonable doubt. This Court must do for all federal courts what the Fifth Circuit en banc did in **United States v. Malatesta**, 590 F.2d 1379 (5th Cir. 1979): banish the slight evidence rule.[4]

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[4] The Government neither cites nor responds to this case. The Government erroneously contends that the petitioner would be satisfied by the semantical gymnastics of **United States v. Marsh**, 747 F.2d 7, 13 (1st Cir. 1984) (BIO 6). The **Marsh** decision was cited as an example of the judicial quagmire that needs to be

II. THE EVIDENCE OF RECORD DID NOT SUPPORT PROOF BEYOND A REASONABLE DOUBT OF THE PETITIONER'S INVOLVEMENT IN THE INTERSTATE TRANSPORTATION OF THE EXPLOSIVE MATERIAL.

The elements of 18 U.S.C. 844(d) are: (1) transportation in interstate commerce of (2) any explosive, (3) with the knowledge or intent that it will be used to injure or intimidate any individual. **United States v. Michaels**, 796 F.2d 1112, 1117 (9th Cir. 1986). The evidence failed as to the first and second elements.

The Government makes reference to the interstate transportation contemplated by the conspirators (BIO 7), but reliance on the actions of the conspirators is unfounded.[5] The

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resolved. Although petitioner cites **Malatesta** for the banishment of the rule, petitioner does not agree with its pre-**Jackson v. Virginia** requirement of "substantial evidence," but rather the requirement that the nexus of knowing involvement in a conspiracy be proved beyond a reasonable doubt.

[5] No **Pinkerton** [**v. United States**, 328 U.S. 640 (1945) (conspirator liable for substantive offenses committed by co-conspirators in furtherance of conspiracy)] instruction was requested by the Government or given by the trial court. (4 RT 35-51). The court of appeals below measured petitioner's conduct solely against the standard of aiding and abetting the transportation offense (Pet. App. A-7). If the Government failed to obtain a **Pinkerton** instruction, then the Court of Appeals could not consider that theory. **United States v. Disla**, 805 F.2d 1340, 1350

Court of Appeals held that petitioner was an aider and abettor with the requisite intent, but expressly held that "scienter as to interstate transportation element of federal offenses is not ordinarily required." (Pet. App. A-7). The court below held that the petitioner need not have aided in or knew of the interstate transportation. The essence of the offense was the interstate transportation as charged, which under the Government's analysis becomes irrelevant.

For some federal statutes the interstate commerce is a jurisdictional nexus that permits the Federal Government to pass police laws, a domain primarily within the authority of the States. In other cases, such as this, the interstate transportation of the explosive device is the prohibited criminal conduct. In **United States v. Feola**, 420 U.S. 671 (1975),

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(9th Cir. 1986).

the gravamen of the offense was the assault, and the defendant need not be aware of the federal status of officer assaulted. Here, the gravamen was the interstate transportation of the explosives. This Court must not permit the limitless expansion of the Congressional intent nor defeat the very wording of the statute itself.

III. THE WRITTEN MOTION TO DISMISS UNDER THE SPEEDY TRIAL ACT BEFORE THE COMMENCEMENT OF THE JURY VOIR DIRE WAS SUFFICIENT.

The Government properly acknowledges that a motion to dismiss, an actual document, making reference to the Speedy Trial Act was filed on the day of trial (BIO 8), and it was filed before the jury was impanelled.

Congress in the enforcement of the 70-days-to-trial requirement mandated ("shall be dismissed on motion of the defendant") relief when requested by the defense. The defense had the burden of proof (more than 70 days had elapsed), but the Government had the burden of

establishing any exclusions of time. If the defendant did not make the motion, the right to a dismissal was waived. 18 U.S.C. 3161(a)(2). The defense motion was made, but the district court never discovered the number of excludable days. The Government never satisfied its statutory obligation to demonstrate the excludable time, which it never did. The Court of Appeals recognized the possible violation, but held that the issue was not preserved for review because defense counsel did not adequately articulate the reasons for the dismissal.

The Speedy Trial Act was created by Congress to regulate the federal courts and insure prompt disposition of criminal cases. The sanctions and procedure for invoking sanctions are clearly spelled out. The defense filed the requisite motion, but neither the prosecutor nor the trial court was concerned about the actual computation. The district

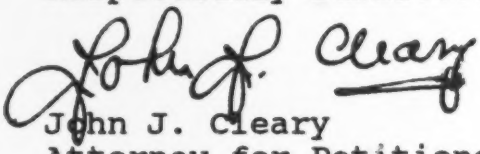
ruled on the motion without ever having the prosecution specifically calculate the excludable time.

It is the duty of the court and prosecutor to maintain responsibility for the enforcement of the Act, which, at a minimum, would be maintaining an accurate posture of the time remaining for trial. This Court must not permit the Act to be avoided by the creation of hurdles for the defense so as to excuse the prosecution and the court of their responsibilities under the Speedy Trial Act.

CONCLUSION

A writ of certiorari should be issued to review these important issues.

Respectfully submitted,



21 March 1989

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